No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") was established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. AAJ is the world's largest trial bar. AAJ is concerned that the overly broad construction of the Federal Arbitration Act advanced by Petitioner in this case undermines the right of American workers to pursue their statutory and common-law rights in a judicial forum.

SUMMARY OF ARGUMENT

Petitioner argues that the Federal Arbitration Act exemption language in Section 1 must be given a modern reading and apply only to transportation "workers" who are paid as employees. AAJ believes it is clear that all workers in the transportation sector, whether "employees" or "independent contractors," were meant to be exempted from the Act.

The FAA was adopted to streamline commercial disputes, particularly when the disputes occur in international and interstate commerce. However, when the International Seamen's Union of

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

America and the American Federation of Labor ("AFL") objected that the proposed language might result in the FAA being applied to workers, advocates for the bill, including the American Bar Association and Commerce Secretary Herbert Hoover, advanced exemption language to alleviate those concerns. While the AFL did not represent most seamen or railroad workers in 1925, one of the largest AFL-affiliated unions and its largest transportation-based union was the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America ("Teamsters"). The Teamsters included independently contracting vehicle owner-operators as a significant part of its membership. The lobbying by the AFL in gaining an exemption for workers would surely have included all members of one of its most important affiliates, the Teamsters.

This Court found in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that the Section 1 exemption focuses on a specific type of work — transportation work — and not on how an individual worker might be paid to perform that work. This is consistent with the interpretation of other statutes in the transportation sector that have been read to include independent contractors. Although the question of whether a worker is an employee or independent contractor can be complex in modern society, that is not an issue necessary for evaluating Section 1. Even today, the Commercial Motor Vehicle Safety Act includes "independent contractor" in its definition of employee. *See* 49 U.S.C. § 31132(2)(A).

Historically, terms such as "contract of employment," "employee," and "employer" were used when discussing either independent contractors or directly controlled employees. When Congress enacted the FAA, these words were not governed by the complicated mechanics of post-New Deal "employee" payments, including the right to benefits and the payment of taxes. In the early part of the Twentieth Century, "employers" routinely hired "independent contractors" and "owner-operators" as "employees" under "contracts of employment." That both the ABA and Commerce Secretary Hoover used the words "contracts of employment" when suggesting the exemption amendment does not in any way limit the "workers" expressly exempted by the FAA, and certainly does not require an analysis of the mechanics of their payment.

It was no doubt recognized by the AFL at the time, as is it recognized today, that worker/employer arbitration often favors employers and disadvantages workers. Forcing individuals to arbitrate single, small-value claims can also mean that individuals may not have adequate representation of their claims. The difficulty for employees and working "independent contractors" is particularly evident when arbitrating against larger employers, such as Petitioner, who substantially benefit from a "repeat player" bias.

Finally, Petitioner's argument that labeling Respondent an "independent contractor" in the agreement is dispositive on the question of whether Section 1 applies is simply wrong. Courts look

beyond the designations and labels in an agreement to the true nature of the transaction and relationship of the parties when interpreting an agreement. This is particularly true in the context of determining whether a worker is an employee or independent contractor, as the advantages of such misclassification have become profound in the past twenty years and, as a result, misclassification has proliferated to the disadvantage of compliant businesses and all taxpayers generally.

Ultimately, the payment status of Respondent is less important than the language of Section 1 and its historical context. Respondent and anyone else driving a vehicle for a living have always been considered workers in interstate commerce, thereby falling squarely within the Section 1 exemption. When read in context with the legislative history and the relationship of the AFL with the Teamsters, it is clear that Respondent is exempted from arbitrating his claims by Section 1.

ARGUMENT

Section 1 of the Federal Arbitration Act ("FAA") states that the Act does not apply to "contracts of employment of seamen, railroad employees, ***or any other class of workers*** engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). Petitioner argues that this broadly worded exemption must be read extremely narrowly to apply only to expressly designated "employees" engaged in interstate commerce rather than all "workers" in the transportation sector,

including "independent contractors." Using this extremely narrow construction of the word "worker," Petitioner argues that the express exemption found in the statute cannot be read to apply to any "independent contractors" who performed the work of driving a vehicle.

Petitioner's narrow construction belies the history behind the enactment of the FAA, Congressional intent, and basic principles of contract construction as applied by this Court and elsewhere. Independent vehicle owner-operators and others contracting to perform work themselves certainly existed at the time the FAA was passed, and had Congress not wished the exemption to apply to all who actually worked in the transportation sector, it would have said so.[2]

I. The AFL, Representing the Teamsters Union, Successfully Lobbied to Have All Transportation Workers Exempted from the FAA, Including Respondent, Without Regard to Whether the Worker Was Paid

[2] The work at issue here is driving a type of vehicle, namely a truck, for commercial purposes. Whether the driver owns a rig outright, is driving a rig involved in a lease arrangement (however complicated), or is simply an employee paid to drive the rig, the work being performed is the same. As AAJ believes that it is clear that the Section 1 exemption was drafted to exempt the worker who is actually performing that work, this brief will neither address the complicated subject of vehicle ownership nor the mechanism by which the working driver is paid – whether as an "independent contractor" or employee. The bottom line is that in every permutation of these variables the work itself does not vary.

as an "Employee" or "Independent Contractor."

The history and policy behind the Section 1 exemption in the FAA for transportation workers is contrary to Petitioner's and its *amici* supporters' insistence that arbitration must be made mandatory for Respondent. That history makes it clear that the framers of the FAA undoubtedly meant to exempt all individual working drivers from its dictates.

Amicus Cato Institute discusses the Congressional history of the exemption language. *See* Cato Br. 25-28. To summarize, the exemption was inserted into the text of the bill in response to objections from the International Seamen's Union of America and the American Federation of Labor ("AFL"). At hearings on the bill in 1923 it was made clear that "it was not the intention of this bill to make an industrial arbitration in any sense."[3]

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[3] W.H.H. Piatt, a lawyer from Kansas City, MO who was the chairman of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association, testified on the FAA bill which was being heavily promoted by the ABA. After he made the above statement, which is quoted in the Cato Institute's brief, Piatt continued:

> [A]nd so I suggest in as far as this committee is concerned, if your honorable committee should feel there is any danger of that, they should add to the bill the following language: "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." *It is not intended that this shall be an act referring to labor disputes at all. It is purely an act to give the merchants the right or*

Hearing Before a Subcommittee of the Committee on the Judiciary, United States Senate, 67th Cong., 4th Sess., 9 (Jan. 3, 1923) [hereinafter "1923 Hearing"]. As part of the Hearing, Commerce Secretary Herbert Hoover also submitted a letter in response to the same objections. That letter stated the following: "[I]f objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by saying 'but nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce.'"[4] 1923 Hearing at 14. Hoover's letter thus included the basic text for what was later adopted. According to the

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> *the privilege of sitting down and agreeing with each other as to what their damages are if they want to do it.* Now, that is all there is in this.

1923 Hearing at 9 (emphasis added). *See also* Ian R. Macneil, *American Arbitration Law* 89-91 (1992).

Shortly thereafter, Senator Thomas J. Walsh of Montana articulated a problem that the objecting unions had with the bill:

> [I]t is the same with a good many contracts of employment. 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it, and then he surrenders his right to have his case tried by the court, and he has to have it tried before a tribunal in which he has no confidence at all.

1923 Hearing at 9.

[4] Secretary Hoover's letter offered essentially the same language as the ABA, except for the addition of "railroad employees." 1923 Hearing at 14.

Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925):

> "Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provided that 'nothing herein contained shall apply to contracts of employment of Seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.' This exempted labor from the provisions of the law, although its sponsors denied it was their intention to include labor disputes."

Quoted in Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 127 n.8 (2001) (Stevens, J., dissenting).

After quoting these contemporaneous documents, the Cato Institute jumps to the conclusion that in making its objection, the AFL was speaking on behalf of what they describe as "traditional employees . . . typically represented by labor unions." Cato Br. 27-28, arguing that it was for the protection of railroad workers that the AFL objected. However, up through 1926 none of what were referred to as the "Big Four" railroad labor organizations (Brotherhood of Locomotive Engineers, Order of Railway Conductors of America, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railroad Trainmen) had ever been affiliated with the AFL. *Organization and*

Membership of American Trade Unions, 23(2) Monthly Lab. Rev. 8, 12 (Aug. 1926), *available at* http://www.jstor.org/stable/41860265 ("These organizations have always maintained their position independent of the American Federation of Labor, and have so thoroughly controlled their field that no question of jurisdiction or dual unionism has arisen.").

Clearly, it is hard to believe that the AFL would have invested its resources in lobbying on behalf of a group of workers who were not part of its membership. After all, the AFL had a vast membership of its own to be concerned about, as it was "divided into 115 national and international unions" (Jay Newton Baker, *The American Federation of Labor*, 22 Yale L.J. 73, 74 (1912)), which did not include the "Big Four" railroad labor organizations. In fact, in 1925 the largest AFL-affiliated transportation-based membership union was the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America ("Teamsters") with 100,000 members. *Organization and Membership of American Trade Unions*, at 13.

At the urging of Samuel Gompers, then the head of the AFL, the Teamsters was formed in Niagara Falls, NY in August 1903. *See* Teamsters, *The First Teamsters: Building a Union*, http://teamster.org/content/first-teamsters-building-union (last visited July 23, 2018). After its formation, the Teamsters was quickly granted a Certificate of Affiliation by the AFL and remained an affiliate until 1957. Teamsters, *Teamster History*

Visual Timeline, https://teamster.org/content/teamster-history-visual-timeline (last visited July 23, 2018). Significantly, through at least 1925 the worker membership in the Teamsters was not restricted to "employees." Both the 1915 Constitution and Bylaws of the International Brotherhood of Teamsters and the next Constitution, the 1925 Constitution and Bylaws of the International Brotherhood of Teamsters, describe Teamster membership as follows:

> No person shall be entitled to membership in this organization ***who owns or operates more than one team or*** vehicle. The General Executive Board, . . . may allow a man to own more than one team or vehicle to ["and" replaced "to" in 1925] hold membership, provided that he hires or employs none but members of our International Union and ***that he drives a vehicle himself*** [.]

Constitution of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, at p.38 (1915), *available at* http://babel.hathitrust.org/cgi/pt?id=uiug.30112073508951;view=1up;seq=5;size=150; Constitution and By-Laws of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, at p.4 (Dec. 1, 1925) (emphasis added).

These owner-operators were a significant part of the Teamster workforce. *Amicus curiae* for

Petitioner, American Trucking Associations, Inc., highlights the importance of owner-operators to the trucking industry and notes that their "role in trucking operations has a history essentially as long as the industry itself." American Trucking Associations Br. 4 (citing *Ex Parte* No. MC 43 (Sub-No. 12), Leasing Rules Modifications, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982), which states that "prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators.").

Clearly, anyone lobbying for the AFL at any time between 1923 and 1925 would have done so on behalf of the members of its affiliated unions and certainly would have advocated on behalf of the drivers of the Teamsters, a union formed at the direct request of the AFL. Indeed, Teamsters' President Daniel Tobin was a member of the AFL's executive counsel and was even Samuel Gompers' campaign manager when Gompers successfully won reelection as the AFL's president in 1921,[5] and the refusal of Teamsters to cross picket lines was often critical to the success of labor actions.[6] Further, the

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[5] Robert D. Leiter, *The Teamsters Union: A Study of Its Economic Impact*, New York, Bookman Associates, Inc., p. 38 (1957), *available at* http://archive.org/details/teamunionst00leit.

[6] *See, e.g.*, *Strike Paralyzes Railway Express*, N.Y. Times (Oct. 14, 1919), *available at* http://www.nytimes.com/1919/10/14/archives/strike-paralyzes-railway-express-embargo-ordered-

Teamsters was one of the largest AFL-affiliated unions and the largest affiliated transportation-worker union. It strains credulity to think that the AFL, in lobbying on behalf of its affiliates, would have cut out a crucial portion of the Teamsters' membership when successfully negotiating changes to the FAA between 1923 and 1925, much less bragging about those changes in 1925.

II. That Congress Meant to Exempt All Workers in the Transportation Sector from the FAA, Not Limited to How That Worker Happened to Be Paid, Is Consistent with This Court's Prior Decisions and Other Congressional Action.

As this Court has stated, any question of statutory interpretation starts with an Act's language. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The meaning of statutory language "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.*

The descriptive language of the Section 1 exemption focuses on the specific type of work and not the mechanics of paying the individual worker doing that work. Given the exemption's inclusion in the law, it must be concluded that Congress

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on-all-shipments.html; *Fight to Finish Opens on Unions in Trucking Tieup*, N.Y. Times (May 26, 1920), *available at* http://www.nytimes.com/1920/05/26/archives/fight-to-finish-opens-on-unions-in-trucking-tieup-wrath-of-whole.html.

intended to limit it only to categories of work — railroad, maritime, and, at minimum, other transportation — not concerning itself with the legal mechanics of how workers were paid to perform the work. This interpretation is consistent with this Court's only prior decision interpreting the Section 1 exemption, where the Court found that the exemption was focused on contracts of employment for "specific categories of workers," such as "seamen," "railroad employees," and "any other class of workers" engaged in transportation activities. *Circuit City Stores, Inc.*, 532 U.S. at 114. Because the plain language centers on the type of work being performed rather than the status of the person performing it, the exemption was certainly written to apply to all transportation workers. There is no basis to exclude "independent contractors" when they actually performed the work in question, because there can be no question that they were "workers" in the transportation sector.

Generally, laws that cover a particular industry or category of worker apply to all workers in that arena. With respect to those statutes, "[i]f the worker did a particular type of work or worked in a particular industry, then he enjoyed the benefit of the law's protection without regard to the extent of the employer's control over the performance of the work." *See* Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 308 (2001).

Other statutes that applied to workers in the transportation sector have been interpreted to include such independent contractors. Statutes relating to "seamen" focused on whether the individual performed the work of a seaman, not on whether the individual was paid as an employee or an individual contractor. *See, e.g., McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991). Regarding the specific wording of the FAA exclusion, in *Circuit City Stores, Inc.*, this Court stated:

> As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence.

532 U.S. at 121.

In fact, even had Congress used the word "employee" instead of the much broader term "worker," the resulting understanding of Congressional intent would be no different. In definitions related to the Commercial Motor Vehicle Safety, Congress expressly provided:

> "[E]mployee" means an operator of a commercial motor vehicle (***including an independent contractor when***

> ***operating a commercial motor vehicle***) . . . who directly affects commercial motor vehicle safety in the course of employment.

49 U.S.C. § 31132(2)(A) (emphasis added).

The accompanying regulations similarly define "employee" broadly as including "a driver of a commercial motor vehicle (including an ***independent contractor*** while in the course of operating a commercial motor vehicle)." 49 C.F.R. § 390.5 (emphasis added). *See, e.g., Sharpless v. Sim*, 209 S.W.3d 825, 829 (Tex.App.—Dallas 2006); *Amerigas Propane, LP v. Landstar Ranger, Inc.*, 109 Cal. Rptr. 3d 686, 698 (Cal. App. 2010). If this is true when the word "employee" is used, certainly the much broader term "worker" – with no underlying legal meaning but only a meaning descriptive of the actual job performed – was meant to include anyone performing actual transportation work.

III. In Historical Context the Use of the Term "Contracts of Employment" Was Routinely Used to Include the "Employment" of "Independent Contractor" Drivers and, Hence, Not Meant to Exclude Any Drivers from the Benefit of the Lobbied-For Exemption.

Petitioner relies on Section 1's use of the phrase "contracts of employment" to argue that "non-employees" cannot fall within the exemption. First, by focusing only on the phrase, "contracts of

employment," Petitioner distorts the exemption and is forced to ignore that Section 1 exempts "any other class of ***workers*** engaged in foreign or interstate commerce," not merely "any other class of ***employees***." (emphasis added). 9 U.S.C. § 1. Moreover, in the general parlance of the early 20th Century, descriptive words such as "worker," "employer," and "contract of employment" were as a rule used to describe the type of work performed rather than referring to more modern legal distinctions emanating from post-New Deal tax and benefit relationships and mechanics of pay. As such, when both the ABA and Commerce Secretary Hoover suggested the use of the wording "contracts of employment" in 1923, neither the ABA, the Secretary, nor Congress would have understood there to be any need to clarify further that non-employee drivers were included among those "workers" entering into "contracts of employment."

Before the 1930's, even the word "employee" on its own did not exclude independent contractors. When there was no reason to distinguish between different kinds of workers, the word "employee" was often used to refer to any worker, including independent contractors. *See, e.g., Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922) (explaining that in the Transportation Act of 1920, when Congress referred to "railroad employees[,] it undoubtedly contemplate[d] those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors).

At the time of the drafting of the FAA, "independent contractors" in the transportation industry were often described as individuals engaged in "independent employment." *See, e.g., City of Chicago v. Robbins*, 67 U.S. 418, 425 (1862) (describing a skillful contractor exercising an "independent employment" as an independent contractor); *Kreipke v. Comm'r of Internal Revenue*, 32 F.2d 594, 596 (8th Cir. 1929) (defining an "independent contractor" as one who is "exercising an independent employment"); *Du Bois Electric Co. v. Fidelity Title & Trust Co.*, 238 F. 129, 131 (3d Cir. 1916) (similar).

Independent contractors were frequently referred to as "employed." *See, e.g., The Bjornefjord*, 271 F. 682, 683 (2d Cir. 1921) (". . . due to the negligence of an independent contractor employed by them. . ."); *Maryland Dredging & Contracting Co. v. State of Md.*, 262 F. 11, 13 (4th Cir. 1919) (". . . on the ground that its owner was employed as an independent contractor."); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("[T]he party employed was an independent contractor."); *The Indrani*, 101 F. 596, 598 (4th Cir. 1900) ("If an independent contractor is employed"); *Woodward Iron Co. v. Limbaugh*, 276 F. 1, 2 (5th Cir. 1921) (". . . which Waters was employed to do as an independent contractor."); *W. A. Arthur v. Texas & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (describing "an independent contractor" as "employed . . . to do work"); *James Griffith & Sons Co. v. Brooks*, 197 F. 723, 725 (6th Cir. 1912) ("[T]he company . . . employed him as an independent contractor."); *Pioneer S.S. Co. v.*

McCann, 170 F. 873, 877 (6th Cir. 1909) ("[W]hen a shipowner has employed an independent contractor . . .").

It was also true that those who hired independent contractors were called their "employers." *See, e.g., McClaren v. Weber Bros. Shoe Co.*, 166 F. 714, 719 (1st Cir. 1909) ("In other words, ordinarily, where work of this kind is done by a skilled independent contractor, the law holds that the employer . . . "); *Middleton v. P. Sanford Ross*, 213 F. 6, 10 (5th Cir. 1914) (". . . the employer of the independent contractor."); *Murch Bros. Const. Co. v. Johnson*, 203 F. 1, 4 (6th Cir. 1913) ("The doctrine of independent contractor is that one who lets work to be done by another according to such other's own methods and without being subject to the control of his employer. . ."); *Dwyer v. National S.S. Co.*, 4 F. 493, 498 (E.D.N.Y. 1880) ("If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commits some casual act of wrong or negligence, the employer is not answerable. (citation omitted)").

Unsurprisingly, numerous cases during this period refer to independent contractors' agreements to perform work as "contracts of employment." *See, e.g., West Hartlepool Steam Navigation Co. v. Benemelis S.S. Co.*, 1914 WL 1962, 12 Teiss 3, 5 (La. Ct. App. 1914) ("It devolves upon him who relies upon the defense of independent contractor to plead and prove the nature of the contract of employment . . ."); *Caron v. Powers-Simpson Co.*, 104 N.W. 889, syllabus (Minn. 1905) (". . . where there is dispute of

fact as to whether the contract of employment was made with an independent contractor . . . is for a jury . . ."); *Tankersley v. Webster*, 243 P. 745, 747, (Okla. 1925) ("[T]he contract of employment . . . conclusively shows that Casey was an independent contractor."); *Lindsay v. McCaslin*, 122 A. 412, 413 (Me. 1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law."); *Drennon v. Patton-Worsham Drug Co.*, 109 S.W. 218, 219 (Tex. App. 1908) ("Where the work is done, however, in the manner and by the means contemplated in the contract of employment, and the contractor is performing the work strictly in the manner expressly or impliedly directed by the employer, the latter cannot escape liability by the plea that an independent contractor committed the act."); *Waldron v. Garland Pocahontas Coal Co.*, 109 S.E. 729, syllabus (W. Va. 1921) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, [and] the circumstances under which the contract was made and the work was done."). *See also, e.g.*, *U.S. Fid. & Guar. Co. of Baltimore, Md., v. Lowry*, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (whether a person is an independent contractor or employee depends upon whether the "contract of employment" gives the employer the right "to control the manner and continuance of the particular service and the final result" (citation omitted)); *Hamill v. Territilli*, 195 Ill. App. 174, 176 (1915) ("Appellant strongly contends that under the contract of employment

Territilli and Scully were independent contractors.").

Thus, when Secretary Hoover and attorney Piatt, representing the ABA, each suggested the use of the words "contracts of employment," they would have understood this phrase to be the generic terminology used to describe agreements under which teamsters — that is, truck drivers — worked. *See, e.g., Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 477 (1919) (explaining that a motor truck lessee performing transfer and delivery services under a "written contract of employment" could be either "an independent contractor or [a] servant" depending on how the work was actually performed).[7]

IV. Mandatory Individual Arbitration for Far-Flung Transportation Workers Places Them at a Distinct Disadvantage Inconsistent with Congressional Intent That These Critical Workers Would Not be Subject to the FAA.

Today, just as in 1925, those working in the commercial trucking industry, including "independent contractors" who drive their own rigs,

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[7] A contemporaneous article, *Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926), distinguishes these two types of "employment" of "independent contractors" in greater detail: "When the contract of employment is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally...the employment is generally an independent one." (citing cases).

frequently stand unequally when they are engaged in a legal dispute with those who pay for their work. Often, they reside hundreds if not thousands of miles away from those who employ them. Yet, by contract the one that pays for their services generally sets up where the arbitration may take place and what law is to be followed. Large national or regional employers also have the advantage of frequent association with the same arbitral forum and even at times the same arbitrators.

Amici Chamber of Commerce of the United States of America and the Society of Human Resource Management [collectively referred to as "*amici* Chamber"] state in their *amici* brief [hereinafter "Chamber Br."] that workers benefit from arbitration. Chamber Br. 12-14. Empirical evidence contradicts these claims.

Arbitration has actually proven to be an ineffective mechanism, especially for protecting transportation workers, who, as has been stated, are often disbursed throughout the nation and distant from those paying for their services. This is demonstrated by the fact that even before employers began routinely including arbitration provisions in their mandatory employment agreements, the number of workers filing workplace claims in arbitration dropped substantially, and the amount of those workers' recoveries was comparatively low. *See, e.g.*, Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018) (citing recent empirical studies and analyzing structural causes); Judith Resnick, *Diffusing*

Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L.J. 2804, 2813-14 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brooklyn L. Rev. 1309 (2015); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berk. J. Emp. & Lab. L. 71 (2014) [hereinafter "Colvin 2014"]; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1, 6 (2011).

Many attorneys are also unwilling to take individual arbitration cases because a plaintiff's chances of winning in arbitration are so low and often costlier than pursuing the matter in court (and certainly when the alternative is the ability to pursue the grievance collectively). *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 7, 2015), *available at* http://www.epi.org/publication/the-arbitration-epidemic/. This lack of representation not only acts as a barrier to entry, but also reduces the likelihood of a successful outcome in arbitration. *See generally* Colvin 2014, *supra* (summarizing information from multiple studies); Estlund, *supra*. For instance, one study found that employees recovered compensation in only 21.4 percent of arbitrations as compared to 57 percent of state court employment cases, and that the median award was

over $30,000 less in arbitrations than in state court cases. Colvin 2014, *supra*, at 79-80.

Few employees subject to arbitration agreements bring small claims, because the cost of doing so, including time and travel costs, can easily outweigh any potential benefit. When they do bring claims, regardless of size, they achieve systematically worse results against employers. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457, 462 (2016). For example, individual employees who avail themselves of telephonic hearings, which are often touted as a uniquely informal device that facilitates access to arbitration, have win rates that are significantly lower than those who do not take advantage of the informal procedure. *Id.* at 492.[8]

Moreover, although such informal procedures ostensibly allow employees to present claims without the assistance of lawyers, unrepresented

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[8] There is also no empirical evidence to suggest that arbitration provisions result in savings to consumers. In its 2015 Report to Congress, the Consumer Financial Protection Bureau found that pre-dispute arbitration clauses in the consumer financial products or services setting did not result in lower costs to consumers, stating, "[W]e did not identify statistically significant empirical support for the claim that companies pass cost savings relating to their use of pre-dispute arbitration clauses to consumers." Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Section 10.3 p. 19 (March 2015) *available at* https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

employees prevail just 7 percent of the time. When represented, their success rate nearly triples, as employees represented by lawyers prevail between 19 percent and 28 percent of the time. *Id.* at 485; *see also* Alexander Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors & Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019, 1037 (2015) [hereinafter "Colvin & Gough"] (observing that self-represented employees have lower success rates, lower damages awards, and greater susceptibility to repeat player effects).

Citing the twenty-year-old article Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998), *amici* Chamber maintain that "employees who arbitrate their claims are more likely to prevail than those who go to court" and that this applies with "equal force to independent contractors." Chamber Br. 12. They support this by referring to Maltby's characterization of an article by Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Empl. Rts. & Employ. Pol'y J. 189, 210 (1997). However, the Bingham article does not compare litigation outcomes with arbitration outcomes. It compares outcomes of employees arbitrating against "Repeat Player" employers with those arbitrating against "non-Repeat Player" employers. When the employer is a "repeat player," employees succeeded in recovering damages just 16% of the time, more than four times worse than arbitrating against employers who were not repeat players. *Id.* Because these *amici* have taken these underlying statistics out of context, the meaning of

the success rate they attribute to employees is not useful.[9]

In their struggle to find additional support for their position, *amici* Chamber cite a report compiled by the National Workrights Institute, which relies on two Bingham reports, the Maltby article, and a fourth report, "Eisenberg," to claim that employees who arbitrate have an overall 62 percent success rate. This study appears to build on the same erroneous findings *amici* Chamber cite originally.[10] Additionally, the National Workrights study concludes that the "number of studies, and the size of the data sets involved, is too small to draw conclusions." The National Workrights Institute, *Employment Arbitration: What Does the Data Show?*, https://web.archive.org/web/20101202200115/http://workrights.org/current/cd_arbitration.html (last visited July 9, 2018).

Similarly, another article *amici* Chamber cite notes that "the figures on arbitration and court litigation are all over the plot." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017). But St. Antoine does identify a significant difference in the success rates of higher-paid employees and lower-paid employees (*id.*), and lower-paid employees would include

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[9] Also, these statistics do not account for the people who cannot bring claims because the potential damages are too small.

[10] Due to the lack of internal citations in the study, it is difficult to evaluate these findings with more specificity.

Respondent and those similarly situated to Respondent.

In addition, when individuals do participate in arbitration proceedings, there is evidence that the arbitrators tend to favor the "repeat player" corporations that appear before them and pay them on a regular basis. Where a corporation, such as Petitioner, can force hundreds, if not thousands, of individuals into arbitration, there is a documented bias that results in favor of the corporate entity. This "repeat player" bias issue is also well-documented in academic studies.[11]

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[11] The press has also recognized this "repeat player" bias. *See* Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015, http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("[T]he rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show."); Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. Times, Nov. 1, 2015, http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html ("[Arbitration R]ules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found.... 'This is a business and arbitrators have an economic reason to decide in favor of the repeat players.'"). Further, "in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business. [¶] Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. 'Why would an arbitrator cater to a person they will never see again?' she said." *Id.*

A recent study[12] by Colvin & Gough, *supra*, found that:

1) Earlier academic research on repeat player effects in arbitration have generally supported the existence of a repeat player effect and that employers involved in multiple arbitration cases tend to do better than first-time participants. *Id.* at 1023-25.
2) On average, each previous interaction between a given employer and an arbitrator decreases the odds of an employee's winning. When all other independent variables are controlled, the probability an employee will win her case when bringing it before a first-time employer-arbitrator pairing is 17.9%, but if the defending employer had four previous interactions with the arbitrator, the probability decreases to 15.3%, a 14.9% decrease. If there were 25 previous interactions between an employer-arbitrator pairing, the probability declines to 4.5%, a 75% decrease relative to first time pairings. *Id.* at 1031-1035.
3) Even when they controlled for employer size and experience in arbitration, every

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[12] Colvin's and Gough's study used a database of American Arbitration Association ("AAA") arbitrations. Colvin & Gough pp. 1026-27. AAA is a non-profit organization and its neutrals only make money on the cases they personally handle. In contrast, JAMS is a "for-profit" entity and its owner-neutrals also make money on cases they do not personally handle. Because the economic incentives are greater, there is no reason to believe that the repeat player effect would be lessened at all in JAMS arbitrations.

> additional interaction between an employer and an arbitrator resulted in reduced employee outcomes as measured by (a) win rates and (b) monetary award amounts. "One possible explanation for this relationship is that some arbitrators may be responding to economic incentives and issuing favorable awards to repeat clients." *Id.* at 1037.
>
> The authors conclude:
>
> > Justice in mandatory arbitration is not blind if parties are able to gain an advantage . . . especially if there are gains from doing repeat business with the same arbitrator.
>
> *Id.* at 1040.

V. Labels Attached by Petitioner to the Agreement It Prepared Cannot Be Dispositive.

Even if the distinction as to whether Respondent is an employee or independent contractor were germane, that is not an analysis that can be blindly accepted based upon the mere fact that Petitioner elected to include the words "independent contractor" in the underlying agreement it prepared. It is well-settled that in determining the relationships between parties and the true nature of an agreement, courts will look beyond the formal designations and labels in the agreement. *See, e.g., Union Pac. Ry. Co. v. Chicago,*

R.I. & P. Ry Co., 163 U.S. 564, 582 (1896) (what the agreement "was styled by the parties does not determine its character or their legal relations..."); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 354 (1922) (a debtor does not become the agent of his creditor simply because he is called an agent); *Topping v. Trade Bank of N.Y.*, 86 F.2d 116, 117-18 (2d Cir. 1936) (a usurious loan is not made lawful by falsely terming it a sale . . . or a corporate obligation); *Sorah v. Sorah*, 163 F.3d 397, 401 (6th Cir. 1998) (instructing bankruptcy courts to look beyond the label applied in the decree to determine whether a debtor's obligation to a spouse arising from a divorce decree "is actually support" and not dischargeable); *see generally K.C. Air Cargo Services, Inc. v. City of Kansas City*, 523 S.W.3d 1, 7 (Mo. Ct. App. 2017) ("[Courts] are to interpret a contract by what its language means rather than by the definition of certain terms or what the parties call it."); *East Ramapo Cent. School Dist. v. Mosdos Chofetz Chaim, Inc.*, 36 N.Y.S.3d 344, 345 (2016) ("It is well settled that an agreement's characterization is not determinative of the nature of the transaction; 'rather, the true nature of the transaction must be gleaned from the rights and obligations set forth therein' (citations omitted)").

Numerous courts, including this Court, have found that the simple designation of a worker as an independent contractor on the face of an agreement is not determinative of the relationship between the parties. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (employment status depends on all of the factual incidents of the

relationship); *Campbell v. Washington County Technical Coll.*, 219 F.3d 3, 7 (1st Cir. 2000) ("Maine courts follow the oft-stated rule that the legal relationship between the parties does not turn on the label the parties themselves attach."); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 232 (2d Cir. 1995) (employment or agency status "not determined solely by the label used in the contract between the parties"); *Morey v. Western Am. Specialized Transp. Servs., Inc.*, 968 F.2d 494, 498 n.5 (5th Cir. 1992) (contractual designation of trucker as "independent contractor" held "not determinative"); *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 427 (7th Cir. 2012) (each case must be decided on its own facts and circumstances); *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1343 n.7 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) (an employee does not become an independent contractor simply because a contract describes him as such); *Slayman v. FedEx Ground Package System, Inc.*, 765 F.3d 1033, 1042 (9th Cir. 2014) (under Oregon law, "a contract's recitation of an independent-contractor relationship is not dispositive."); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) (the employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties).

Indeed, in recent times, so many advantages have been found to exist in misclassifying employees as "independent contractors" that such misclassification of employees has become a pervasive issue throughout the nation. Between

February 1999 and February 2005, the number of workers classified as independent contractors in the United States grew by 25.4 percent. *See* U.S. Government Accountability Office, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656, App. III. Tbl.4 p.47 (July 2006), *available at* http://www.gao.gov/assets/260/250806.pdf (showing changes in size of contingent workforce). The U.S. Department of Labor's Employment and Training Administration found that between 2010 and 2017 the number of misclassified employees discovered as part of audits increased from 206,626 to 347,320 even though fewer audits were conducted. U.S. Department of Labor, *Unemployment Insurance Tax Information*, Calendar Year 2010, http://oui.doleta.gov/unemploy/pdf/UI_taxinfo/2010/MisclassifiedEmployees.pdf; U.S. Department of Labor, *Unemployment Insurance Tax Information*, Calendar Year 2017, http://oui.doleta.gov/unemploy/pdf/UI_taxinfo/2017/MisclassifiedEmployees.pdf.

Another study commissioned by the U.S. Department of Labor found that up to 30 percent of audited employers misclassified workers. Lalith de Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, p.iii (Feb. 2000) http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

Courts also have recognized that this is a growing concern. *Craig*, 686 F.3d at 430-31 ("The number of independent contractors in this country is

growing" because of the "economic incentives for employers to use independent contractors and there is a potential for abuse in misclassifying employees as independent contractors.") The *Craig* court also recognized that this misclassification results in significant costs to the government: "'[B]etween 1996 and 2004, $34.7 billion of Federal tax revenues went uncollected due to the misclassification of workers and the tax loopholes that allow it.' 156 Cong. Rec. S7135–01, S7136 (daily ed. Sept. 15, 2010)." *Id.* at 431. In addition, a 2010 study estimated that misclassifying by employers shifts $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums from those misclassifying to law-abiding businesses annually. Douglas J. McCarron, *Worker Misclassification in the Construction Industry: Time to Stand Up for Law-Abiding Employers*, Construction Labor Report, BNA Insights (April 7, 2011), http://web.carpenters.org/Libraries/PDFs_Misc/Construction_Labor_Report_--_McCarron_on_Misclassification_4-7-2011_sm.sflb.ashx.

* * *

In 2018, this Court addressed the FAA in *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, 1625 (2018). In so doing, this Court noted that there was no "clear and manifest congressional command" to displace the FAA when passing the NLRA, and specifically pointed to the fact that the NLRA does not mention class or collective action procedures. *Id.* at 1624. However, the issue before this Court here is not whether "two statutes cannot be harmonized"

but instead whether Section 1 of the FAA itself manifests the clear intent of Congress to exempt all transportation workers from its purview. *Id.* at 1624. As this Court held in *Circuit City Stores, Inc.* the FAA does manifest just such a clear congressional intent to exempt "specific categories of workers" such as "seamen," "railroad employees," and "any other class of workers" engaged in transportation activities from its requirements. *Id.* at 114. Respondent is exempted from the FAA.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the U.S. Court of Appeals for the First Circuit.

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July 24, 2018